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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, *Petitioner*,

v.

ANTHONY CORNELL BEAN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do federalism concerns apply in a habeas corpus action brought under 28 U.S.C. section 2254 so that a federal court must honor a State's sovereign authority to create and apply its own neutral discretionary rules of procedure, rendering a federal claim forfeited, as long as the State's invocation of the rule does not evade or is not pre-empted by federal law?

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

ARTHUR CALDERON, *Petitioner*,

v.

ANTHONY CORNELL BEAN, *Respondent*.

Arthur Calderon, Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as 96 F.3d 1126 (9th Cir. 1996), denying petitioner's petition for a writ of mandamus. A copy of that decision is attached as Appendix B to this petition for writ of certiorari. The order of the United States District Court for the Eastern District of California that denied petitioner's motion for summary dismissal is unreported and is reproduced and attached as Appendix D.

STATEMENT OF JURISDICTION

The warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the

Ninth Circuit was entered on September 30, 1996. The petition for rehearing was denied on November 25, 1996.

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the Constitution or law of any state to the contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On July 20, 1981, respondent Bean ("Bean") was sentenced to death upon his conviction for the murder of Beth Schatz, and he was sentenced to state prison for a term of life without the possibility of parole for the murder of Eileen Fox.

On September 19, 1988, the California Supreme Court affirmed the conviction in Bean's appeal in *People v. Bean,* 46 Cal.3d 919 (1988).

On April 24, 1989, Bean filed a petition for writ of certiorari in the United States Supreme Court. Petitioner's petition was denied on March 19, 1990, by the United States Supreme Court.

On June 4, 1990, Bean acting in propria persona, filed a request for appointment of counsel in the United States District Court for the Eastern District of California. On July 26, 1990, counsel was appointed to represent Bean. On July 18, 1991, counsel for Bean filed a federal petition for writ of habeas corpus.

On July 30, 1991, the State filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

On September 26, 1991, the United States District Court for the Eastern District of California ordered that Bean exhaust all unexhausted claims and ordered petitioner's execution stayed.

On October 31, 1991, counsel was appointed by the California Supreme Court for purposes of filing Bean's writ for state habeas corpus.

On July 23, 1993, the California Supreme court issued its decision in *In re Clark,* 5 Cal.4th 750 (1993). Without explanation, Bean waited until June 1, 1994, to file his first and only petition for writ of habeas corpus in the California Supreme Court.

On June 6, 1994, the California Supreme Court requested the State to file an informal response to the above-referenced petition.

On February 23, 1995, the California Supreme Court denied Bean's petition for writ of habeas corpus[1] as follows:

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which [Bean] lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in the investigating and presenting the claims. *In re Clark, supra,* 5 Cal.4th 750, 774-775.

The California Supreme Court *also* specifically addressed numerous issues as ". . . procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." *In re Harris*, 5 Cal.4th 813, 826 (1993); *In re Clark, supra,* 5 Cal.4th 750, 765; *In re Waltreus,* 62 Cal.2d 218, 225 (1965). *See also, People v. Bean, supra,* 46 Cal.3d 919.

Lastly, the California Supreme Court addressed several issues noting that they had ". . . been considered on their merits, *see In re Clark, supra,* 5 Cal.4th 750, 797-798, but, in light of the record of the trial and related proceedings, failed to state a prima facie case entitling [Bean] to relief."

Bean filed a federal petition for writ of habeas corpus on or about March 22, 1995.

On July 21, 1995, the State filed a motion to dismiss Bean's petition urging that his contentions had

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1. The California Supreme Court's decision is attached to this petition as Appendix A.

been procedurally defaulted in state court as untimely. (Additionally, the State argued that specific claims were procedurally barred as articulated by the California Supreme Court above.)

On November 17, 1995, the magistrate judge, pursuant to a referral by the respondent district court under 28 U.S.C. section 636, subdivision (b)(1)(B), and Local General Order No. 262, filed Findings and Recommendations (hereinafter "F and R"), wherein the magistrate judge denied the motion by petitioner herein, to dismiss all 52 claims of Bean, based on independent and adequate state procedural bars. A copy of these findings is attached hereto as Appendix C and is incorporated by reference herein.

In his "Findings and Recommendations," filed November 17, 1995, the magistrate judge refused to apply *Clark* or *Harris* to Bean's state habeas petition even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims, "i.e., within a reasonable time after the final date of *Stankewitz*[2] [January 16, 1986], *Clark* was not the law." F&R p. 8, fn. omitted.

On March 29, 1996, the respondent district court, over the State of California's objections, filed an order adopting the magistrate judge's Findings in their entirety and denying the State's motion to dismiss. Appendix D.

On July 18, 1996, petitioner filed a petition for writ of mandate and/or prohibition in the Ninth Circuit Court of Appeals. In an opinion filed on September 30, 1996, the court of appeals denied the petition. *Calderon v. United States District Court for the Eastern District of*

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2. *In re Stankewitz*, 40 Cal.3d 391 (1985).

California (Bean), 96 F.3d 1126 (9th Cir. 1996). On November 26, 1996, petitioner's petition for rehearing was denied.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case involves Bean's default of approximately 52 constitutional claims that were first brought on state collateral attack approximately 13 years after his judgment of conviction and more than five and one-half years after the California Supreme Court decided his direct appeal. These facts present the Court with a substantial question of national importance by requiring the Court to define for the very first time in a federal habeas setting the amount of deference a federal court must give a State's invocation of a procedural bar in recognition of the State sovereign power to create and invoke its own neutral rules of procedure. The Court has never before been called upon to decide whether the principles of comity and federalism affect either the nature or the application of the adequate state ground test in an action filed under 28 U.S.C. section 2254.

In this case, Bean's automatic appeal from his 1981 conviction became final in 1988, four years prior to the California Supreme Court's decisions reaffirming California's well established timeliness procedural bars. *In re Clark, supra*, 5 Cal.4th 750; *In re Harris, supra,* 5 Cal.4th 813. These decisions by the California Supreme Court predated Bean's 1994 state habeas petition by more than 10 months. Additionally, well before the *Clark* opinion was issued and *Clark* served to reaffirm that notice, Bean was on notice that he was required to justify any delay, and he failed to adequately do so.

Certiorari should be granted because adoption of the evasion or pre-emption formulation of the

adequate state ground doctrine is necessary (1) to afford sufficient deference to California's sovereign right under the Tenth Amendment of the Constitution to create and invoke timeliness rules that apply to state collateral attacks on death penalty judgments, (2) to afford sufficient deference to the federalism and comity concerns unique to habeas corpus cases under 28 U.S.C. section 2254, and (3) to make the Ninth Circuit Court of Appeals decision consistent with the Court's cases regarding "firmly established" and "strict" and "regular" enforcement of state rules. This case presents an important question of federal law affecting the most basic aspects of federalism, a question up to now unresolved by this Court, with especially far-reaching impact in collateral attacks on state death penalty judgments.

ARGUMENT

I.

THE OPINION IN CALDERON V. U.S. DISTRICT COURT FOR EASTERN DISTRICT OF CALIFORNIA, SUPRA, 96 F.3D 1126, CONFLICTS WITH AND MISAPPLIES NINTH CIRCUIT PRECEDENT ON AN IMPORTANT QUESTION OF FEDERAL LAW

A case is appropriate for review on certiorari "[w]hen a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . ." Supreme Court Rule 10.1. The present case is an example of such a conflict.

Balancing the need for finality against the need to correct fundamental injustices, this Court has determined that a habeas petitioner seeking to raise a defaulted claim in federal court must show "cause" for the default. *See Francis v. Henderson,* 425 U.S. 536, 542 (1976). Not surprisingly, many state courts and legislatures have come to similar conclusions. Hence, California requires a showing of "good cause' for an untimely petition, *see Morales v. Calderon,* 85 F.3d 1387, 1390 (9th Cir. 1996) (quoting Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standard 1-2 (1989)).

The lower court denied petitioner's motion to dismiss based on the conclusion that there were not adequate and independent grounds to preclude federal review because, inter alia, California's timeliness bar was not sufficiently clear at the time of Bean's "purported default." In *Calderon v. United States District Court,*

Eastern District of California (Bean), supra, 96 F.3d 1126, the court of appeals upheld the lower court order.

The opinion in *Calderon v. United States District Court, Eastern District of California (Bean), supra,* directly contradicts California's clear consistent application of the timeliness requirements and ignores the recent Ninth Circuit opinion in *Woratzeck v. Stewart*, 97 F.3d 329 (9th Cir. 1996). Moreover, the Ninth Circuit Court's opinion is based entirely on the unreliable and unproven factual premise that the California Supreme Court did not regularly and routinely apply its timeliness requirement prior to the opinion in *Clark.* This factual predicate to the rejection of California's timeliness bar originated as an unproven observation in *Karis*[3] and has evolved into an accepted part of the myth.

Woratzeck* v. *Stewart

In *Woratzeck v. Stewart, supra*, 97 F.3d 329, the petitioner argued that the Arizona "especially heinous, cruel or depraved" aggravating factor was unconstitutionally vague. Although the Arizona Supreme Court explained the interpretation of that factor in *State v. Gretzler*, 659 P.2d 1, cert. denied 461 U.S. 971, (1983), that decision came after Woratzeck's appeal. Woratzeck argued that the adequate narrowing interpretation discussed in *Gretzler* could not have been applied in his case.

The Arizona Supreme Court, however, explained in subsequent cases that "Gretzler did not present a new, narrower interpretation of the . . . factor, but simply a digest of the previously legitimate applications of the factor." *Woratzeck v. Stewart, supra*, 97 F.3d 329 at 333, citation deleted.

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3. *Karis v. Vasquez,* 828 F. Supp. 1449, 1463-1464 (E.D. 1993).

Accordingly, the Ninth Circuit held that *Gretzler* did not change the law but merely summarized and clarified how that aggravating factor had been applied in the past. *Ibid.* Similarly, petitioner respectfully submits that *Clark* expressly held that the rule announced in that decision did not represent a change in the California Supreme Court's application of the timeliness bar, but simply a clarification of how the Court viewed those bars and how it had consistently applied them in the past.

II.

CALIFORNIA'S TIMELINESS REQUIREMENTS HAVE BEEN CONSISTENTLY APPLIED PRIOR TO *CLARK*, AND *CLARK*'S RESTATEMENT OF ESTABLISHED LAW SHOULD NOT BE USED TO UNDERMINE THE VALIDITY OF STATE COURT DETERMINATIONS[4/]

The California courts have consistently held that a habeas petitioner must assert all claims known to him in a timely manner, and that a petitioner must fully explain and justify any substantial delay in asserting known claims. *In re Clark*, *supra*, 5 Cal.4th at p. 783; *In re Stankewitz, supra*, 40 Cal.3d 391, 396, n. 1; *In re Walker*, 10 Cal.3d 764, 774 (1974). In June of 1989, the California Supreme Court published a detailed set of guidelines pertaining to the timeliness requirements applicable to habeas petitioners in capital cases, entitled 'Supreme Court Policies Regarding Cases Arising From Judgments of Death,' (hereinafter 'the Policies.')

The Ninth Circuit made clear in *Paradis v. Arave*, 954 F.2d 1483 (9th Cir. 1992) that, in evaluating the adequacy of state procedural bars, federal courts must focus on the particular procedural bar invoked in the case at hand. The fact that one particular state procedural bar may be subject to attack on the ground it has been inconsistently or irregularly applied does not justify the inference that a different state procedural bar has also been inconsistently or irregularly applied. *Id.* at 1493.

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4. In a decision filed June 4, 1996, the Ninth Circuit concluded that the application of the pre-*Clark* timeliness bar was not adequate. *Morales v. Calderon, supra*, 85 F.3d 1387.

Any determination of the adequacy of California procedural bars, including the separate timeliness bar, requires a close examination of *Clark*. The California Supreme Court in *Clark* gave its most recent and complete analysis of state procedural bars to petitions for writ of habeas corpus. The court examined, separately, both the successive petitions bar and the timeliness bar. First, the court reviewed the history and application of California's procedural bar to the filing of successive petitions. *In re Clark*, *supra*, 5 Cal.4th at 767-782. The court candidly admitted:

> Our past decisions have thereby suggested that the rules *against piecemeal presentation of claims* and repetitious petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice.
> Emphasis added; *id.* at 768.

However, it is important to understand that the quoted language is found in the section of the state court opinion entitled "Repetitious and piecemeal claims" (*In re Clark*, *supra*, 5 Cal.4th at 767), which limited itself to a discussion of California's two longstanding rules against repeated applications for relief on previously rejected claims and against piecemeal presentation of habeas claims. The California Supreme Court made additional assertions under the separate section entitled "Delay." There the state court observed, "*Our decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim.* [Citation omitted.]" *In re Clark*, *supra*, at 783; emphasis added. The court in *Clark* expressly observed that:

> Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed *was on notice* that any substantial delay in filing a petition after the grounds became known had to be justified. *In re Stankewitz*, 40 Cal.3d 391, 396, fn. 1 (1985). Emphasis added; *Id.* at 782.

Moreover, the court did not suggest that the publication of the Policies, or its decision in *Clark*, altered the court's longstanding approach to the timeliness bar. The Policies merely set forth a presumption of timeliness and referred directly to *Stankewitz* as the appropriate standard for assessing timeliness. *In re Clark*, *supra*, at 783. Consequently, the court rejected petitioner's claim that the Policies changed any preexisting timeliness requirements. *Id.* at 785. To the extent the Policies did add a duty to counsel to investigate possible claims, the California court also allowed a petitioner to present claims discovered as a result of investigation commenced promptly after the Policies became effective on June 6, 1989. *Ibid.*

Petitioner submits that, *if* the California Supreme Court's admission of inconsistent application of the bar against successive petitions is accepted without question or analysis, so too should its consistent requirement that substantially delayed claims be justified be acknowledged.

Petitioner urges this Court to refuse to blur the distinction between the successive petitions bar and the timeliness bar. Even assuming the successive petitions bar, prior to the court's decision in *Clark*, would not have been an adequate state procedural bar to preclude federal review, the timeliness bar is not subject to the same analysis. The timeliness bar in California is longstanding; the Policies predated petitioner's state

habeas petition by almost five years; the court's ruling in *Clark* predated petitioner's state habeas petition by 10 months; well before the *Clark* opinion was issued and Clark served to reaffirm that notice, petitioner was on notice that he was required to justify any delay, and he failed to adequately do so. Application of the timeliness bar was not infrequently, unexpectedly, or freakishly applied to petitioner. *See Johnson v. Mississippi*, 486 U.S. 578, 587-589 (1988).

Thus, the California Supreme Court's holding in *Clark* did not indicate that its prior holdings with respect to the timeliness bar were inconsistently applied. And, importantly in the instant case, the California courts have always required that a petitioner justify any substantial delay in filing a habeas petition. Bean, in the instant case, has failed to justify the delay in presenting his new claims against his capital murder conviction.

III.

THE NINTH CIRCUIT ERRONEOUSLY DETERMINED THAT THE INSTANT CASE WAS A "PRE-CLARK" MATTER

Significantly, the opinion of the court of appeals declines to determine "whether Clark sufficiently clarified California's timeliness requirements." *Calderon v. United States District Court, Eastern District of California (Bean), supra,* 96 F.3d 1126, 1130. Petitioner respectfully submits that the decision of the California Supreme Court specifically relying upon *Clark* cannot logically be deemed an application of a pre-*Clark* rule. *Calderon's* holding that the "purported procedural default" occurred pre-*Clark* is, in effect, a holding that the imposition of *Clark* as a timeliness bar in this case acted as a statute of limitations that expired pre-*Clark.*[5]

However, *Clark* directly refutes this point of view. In framing the issue under review as when the Court should review the merits of an untimely or successive petition, *In re Clark,* 5 Cal.4th at 795, the California Supreme Court was careful to point out that it was not taking the "unprecedented" action of creating a "'statute of limitations' for habeas corpus petitioner," finding "no such limitation has been imposed or is

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5. The finding that the "purported default" under the delay rule must have been pre-*Clark* is also inconsistent with the conclusion in *Morales v. Calderon, supra,* 85 F.3d 1387, that the delay rule is substantively standardless because it does not define what amount of delay is substantial, and therefore did not give "adequate notice of when his claims would be barred." *Morales v. Calderon,* 85 F.3d at 1391, 1393. If this is true, it is inconsistent for the court in *Calderon v. United Stated District Court, Eastern District of California (Bean),* to be able to determine that the default herein must have occurred pre-*Clark.* In noting this inconsistency, petitioner in no way concedes that *Morales* was correctly decided.

contemplated." *Id.*, at fn. 30. As the court explained: "We do no more than apply the well-established rule that any substantial delay in seeking relief by petition for writ of habeas corpus must be explained and justified." *Id.*

Morales v. Calderon, supra, 85 F.3d 1387, held that California's substantial delay rule is inadequate because it was "'standardless both substantively and as to duration'" and "did not provide petitioner with adequate notice of when his claims would be barred." *Id.*, at p. 1393. *Morales* also specifically identified that one of the vagueness problems with California's timeliness rules is that "[n]either the [Supreme Court Policies] Standards nor [the substantial delay rule under] *Stankewitz* . . . established what amount of delay the court would consider 'substantial.'" *Id.*, at p. 1391.

In contrast to *Morales*, respondent submits that the instant case involves a purely post-*Clark* situation. Accordingly, California's delay rule articulated in *Clark* is similar to and should be accorded the same recognition as the federal delay rule.

In *Francis v. Henderson, supra,* 425 U.S. 536 (1976), the Court found "'no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.'" *Francis v. Henderson, supra,* 425 U.S. at 542. The Ninth Circuit's opinion in this case calls upon the Court now to decide whether there is any reason to give greater preclusive effect to the federal delay rule, found in Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts, than to the two California delay rules invoked in this case by the California Supreme Court.

The Ninth Circuit's finding of inadequacy is based on its subjective view that the substantive elements of California's timeliness bars failed to give *Morales* "adequate notice of when his claims would be barred."

Morales v. Calderon, supra, 85 F.3d at 1393. This is because, in the Court's view, "[n]either the Standards [found in the California Supreme Court Policies] nor Stankewitz['s substantial delay rule] . . . established what amount of delay the court would consider 'substantial' . . . ." *Id.,* at p. 1391.

Rule 9's prohibition of delayed petitions likewise fails to give Bean any "notice of when his claims would be barred" and fails to establish "what amount of delay' is prohibited in federal court. However, a federal court is nonetheless bound to apply the rule and cannot read into the rule its own ad hoc "equitable" concerns of "fair" or "adequate" notice not found in the rule itself. *Lonchar v. Thomas,* 517 U.S. ___, 134 L.Ed. 2d 440 (1996). Thus, this case calls upon the Court to decide whether a federal court may disregard a state's delay rules based on its own "equitable" concerns of "fair" or "adequate" notice not found in the state rules themselves where it would be prohibited from ignoring the federal delay rule based on its own "equitable" concerns of "fair" or "adequate" notice not found in the rule itself.

Petitioner respectfully submits that *In re Clark* is of no substantial difference than *McCleskey v. Zant,* 499 U.S. 467 (1991), where the Supreme Court clarified its abuse of the writ standard, and then applied it retroactively to all cases, including McCleskey's. Indeed federal courts routinely apply judicial pronouncements concerning new habeas rules retroactively. *Coleman v. Thompson,* 501 U.S. 722 (1991) (stricter cause requirements for procedural default announced and applied); *Brecht v. Abrahamson,* 507 U.S. 619 (1993) (relaxed harmless-error rule announced and applied to defeat habeas petition); *Teague v. Lane,* 489 U.S. 288 (1989) (habeas court may not announce or apply intervening new rules for petitioner's benefit).

The Supreme Court has created the pipeline retroactivity rule for judicial decisions in both criminal and civil cases, in part, because it would be an improper exercise of judicial power to engage in prospective judicial decision-making. *See Griffiths v. Kentucky,* 479 U.S. 314, 322, 328 (1987); *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97 (1993). Thus, the Ninth Circuit has imposed on California, for reasons of "fair notice," *see Morales,* 85 F.3d at 1390, exactly the rule that it could not apply to the new or modified rules announced in *McCleskey, Coleman, Brecht,* or *Teague.*

Under the federal rule, whatever reliance interest the losing party has in the previously existing rule is not sufficient to prevent the application of the new or modified rule to his case. "In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper,* 509 U.S. at 97.[6] The "purported default" in *McCleskey* occurred in his prior petition and he undoubtedly relied on the old law in bringing his subsequent and prohibited petition. Thus, the Ninth Circuit's analysis in *Calderon v. United States*

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6. Indeed, the case presents the converse of the situation in *Harper.* There, the Supreme Court held that the state court could not impose a more lenient interpretation of the judicial retroactivity doctrine as to *federal* law, but that it was free to impose a more lenient judicial retroactivity doctrine in applying its own *state* law decisions. 509 U.S. at 100. Here, the Ninth Circuit held that the California Supreme Court could not impose a stricter judicial retroactivity doctrine as to *state* law. Petitioner contends that federalism precepts should prevent the Ninth Circuit from doing this where the Ninth Circuit was not free to impose a more lenient judicial retroactivity doctrine as to *federal* law.

District Court, Eastern District of California (Bean),supra, is contrary to the analysis in *McCleskey.*

Petitioner respectfully submits that the court in *Calderon v. United States District Court, Eastern District of California (Bean), supra,* 96 F.3d 1126, improperly separated the delay rule into questions that separately evaluate the part of the rule requiring "substantial" delay from the part of the rule that requires an explanation or justification for the delay itself. These requirements are opposite sides of the same coin because the rule requires an explanation that advises the court when the petitioner first became aware of the predicate facts of the claim. Under this rule, a California court simply cannot evaluate if there is any substantial delay when, as here, the petitioner "does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims." *Id.,* at p. 1128.

State regulation of its habeas corpus procedural rules, is "essential to the primary governmental functions of administering justice," *Bates v. State Bar of Arizona,* 433 U.S. 350, 3671 (1977), and therefore should be "one of the attributes of sovereignty . . . enjoyed by the government of every State of the Union." Hamilton, The Federalist, No. 81. It is as a basic sovereign right, for example, as the sovereign function of regulating the practice of law within the state, and should only yield where it is pre-empted by federal law. *See Sperry v. Florida ex rel. Florida Bar,* 373 U.S. 379 (1963). (State Supreme Court rules prohibiting non-lawyers from practicing law within the state pre-empted by federal law that allows non-lawyers to practice patent law.)

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar

Dated: February 18, 1997.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, *Petitioner*,

v.

ANTHONY CORNELL BEAN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FILED
February 23, 1995
Clerk, California Supreme Court
/s/ Deputy

No. S040182

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

IN RE ANTHONY CORNELL BEAN

ON

HABEAS CORPUS

Petitioner's application for leave to supplement the petition is granted. The request to withdraw declarations is denied.

The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims. (In re Clark (1993) 5 Cal.4th 750, 774-775.)

Claims II, III, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXIV, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVII, and XLVIII and also procedurally barred in what they were or could have been, but were not, raised on appeal or were waived by failure to

preserve them at trial. (In re Harris (1993) 5 Cal.4th 813, 826; In re Clark (1993) 5 Cal.4th 750, 765; In re Waltreus (1965) 62 Cal.2d 218, 225. See also, People v. Bean (1988) 46 Cal.3d 919.)

Claims IV, XXXII, XXXV, XXXVI, XLVI, XLIX, L, LI, LII, and LIII have been considered on their merits (see In re Clark, supra, 5 Cal.4th 750, 797-798), but, in light of the record of the trial and related proceedings, fail to state a prima facie case entitling petitioner to relief.

Mosk, J. is of the opinion an order to show cause should issue.

_____

Chief Justice

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, WARDEN, Petitioner, v. **THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,** Respondent, **ANTHONY CORNELL BEAN,** Real Party in Interest.	No. 96-70585 D.C. No. Civ. S-89-1643-DFL-PAN OPINION

Petition for Writ of Mandamus to the United States District Court for the Eastern District of California William B. Shubb, District Judge, Presiding

Submitted September 23, 1996*

Filed September 30, 1996

Before: William C. Canby, Jr., Diarmuid F. O'Scannlain and Sidney R. Thomas, Circuit Judges.

Opinion by Judge O'Scannlain

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* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App.P.34(a),Ninth Circuit R. 34-4

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. The court held that a procedural default in state court based on an ambiguous order that does not bar federal habeas review.

Death row inmate Anthony Bean filed a state petition for a writ of habeas corpus. The California Supreme Court denied the petition holding that the entire petition was untimely and that 39 of the claims were procedurally barred in that they were not raised on appeal or were waived by failure to preserve them at trial.

Bean filed a federal habeas petition. The State moved to dismiss, contending that the procedural default doctrine barred federal review because the grounds on which the California Supreme Court denied Bean's state habeas petition were inadequate and independent.

A magistrate judge (MJ) concluded that there were not adequate and independent grounds to preclude federal review. The district court adopted the MJ's findings and denied the State's motion. The State filed a petition for writ of mandamus directing the district court to vacate its order.

[1] The procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine. The adequate and independent state grounds doctrine provides that the Supreme Court will not review a question of federal law decided

by a state court if the decision of the court rests on a state law ground that is independent of the federal question and adequate to support the judgment. The procedural default doctrine bars federal habeas review when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement.

[2] For the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well established at the time of the petitioner's purported default.

[3] The California Supreme Court cited a 1993 case as a basis for denying Bean's claims as untimely. That case attempted to explain and apply the timeliness requirements the California Supreme Court had adopted in 1989 for filing habeas petitions in capital cases. [4] There was no dispute that Bean's default, if any, would have occurred before that 1993 case. [5] In 1996, the California Supreme Court ruled that prior to the 1993 decision California's timeliness requirements were not clear, consistently applied, and well established.

[6] Under the 1996 decision, California's timeliness rules did not provide an adequate state ground barring federal review on the merits.

[7] The California Supreme Court cited three cases as a basis for denying the 39 claims: the 1993 case, a 1965 case, and a second 1993 case.

[8] The 1965 case ruled that any issue that was actually raised and rejected on appeal cannot be renewed in a petition for writ of habeas corpus. A

citation to this case did not bar federal review. The case stood for the ordinary state rule barring relitigation of claims raised on direct appeal, not a ruling on the merits or a procedural default.

[9] The second 1993 case discussed an earlier decision that prohibited raising an issue in a postappeal habeas corpus petition when that issue was not, but could have been, raised on appeal.

[10] The California Supreme Court's order provided no basis upon which to apply this rule, if adequate, to Bean's claims. The order, which was ambiguous, did not specify which of Bean's 39 claims the court rejected under the 1965 decision and which it rejected under the second 1993 decision. A procedural default based on an ambiguous order that does not clearly rest on adequate and independent state ground is not sufficient to preclude federal collateral review. The district court properly declined to dismiss those claims.

COUNSEL

Clayton S. Tanaka, Deputy Attorney General, Sacramento, California, for the petitioner.

Andrea M. Miller, Nageley, Meredith & Ramsey, Sacramento, California, for the real party in interest.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a California death row inmate's procedural default in state court bars federal review of his habeas claims.

I

Arthur Calderon, Warden of the California State Prison at San Quentin (the "State"), petitions this court for a writ of mandamus directing the district court to vacate its order denying the State's motion of summary dismissal of Anthony Bean's habeas petitioner.

In June 1981, a jury convicted Bean of the murders of Beth Schatz and Eileen Fox. Bean was sentenced to life in prison without possibility of parole for the murder of Fox, and to death for the murder of Schatz. The California Supreme Court affirmed Bean's convictions and sentences on September 19, 1988, *People v. Bean,* 760 P.2d 996 (Cal. 1988), and the United States Supreme court denied certiorari on March 19, 1990, *Bean v. California,* 494 U.S. 1038 (1990).

In June 1990, Bean filed an application in federal court for a stay of execution and appointment of counsel. The district court appointed counsel on July 26, 1990, and Bean filed a federal habeas petition on July 18, 1991. On September 26, 1991, the district court granted a stay of execution, allowing Bean to exhaust his state remedies.

Bean filed his state petition for a writ of habeas corpus on May 27, 1994. The California Supreme Court denied the petition on February 23, 1995, for the following reasons:

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims. (In re Clark (1993) 5 Cal.4th 750, 774-775.)
>
> [Thirty-nine claims] are also procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial. (In re Harris (1993) 5 Cal.4th 813, 826; In re Clark (1993) 5 Cal.4th 750, 765; In re Waltreus (1965) 62 Cal.2d 218, 225. See also, People v. Bean (1988) 4 Cal.3d 919.)
>
> [Ten claims] have been considered on their merits (see In re Clark, supra, 5 Cal.4th 750, 797-798), but, in light of the record of the trial and related proceedings, fail to state a prima facie case entitling petitioner to relief.

In re Bean, No. S040182 (Cal.Feb.23, 1995) (order denying petition for writ of habeas corpus).

Bean notified the district court of exhaustion of state remedies and filed an amended federal petition for a writ habeas corpus on March 22, 1995. The State filed a motion to dismiss the petition on July 21, 1995. The State argued that the grounds on which the California Supreme Court denied Bean's state habeas

petition were adequate and independent to preclude federal review.

On November 17, 1995, the magistrate judge recommended that the district court deny the motion. The magistrate judge concluded that there were not adequate and independent grounds to preclude federal review because, *inter alia,* (1) California's timeliness rule was not sufficiently clear at the time of Bean's purported default' (2) California's rule precluding consideration of claims which were raised on appeal is not a procedural bar; and (3) California's rule precluding consideration of claims which could have been, but were not, raised on appeal, was not consistently applied at the time of Bean's direct appeal. The district court adopted the magistrate judge's findings and recommendations on March 29, 1996, and denied the State's motion to dismiss.

The State petitions this court for a writ of mandamus directing the district court to vacate its order.[1]

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1 . On May 8, 1996, the State filed in district court a motion to withdraw from its previous stipulation to an evidentiary hearing on certain issues, arguing that the Antiterrorism and Effective Death Penalty Act of 1996 affects the propriety of an evidentiary hearing on Bean's claims. By order filed May 15, 1996, the magistrate judge denied the motion. No issues regarding the Act's application to Bean's claims are before us on the State's petition.

In determining whether to issue a writ of mandamus, we balance the following five factors ("the *Bauman* factors"):

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires;
>
> (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
>
> (3) whether the district court's order is clearly erroneous as a matter of law;
>
> (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and
>
> (5) whether the district court's order raises new and important problems or issues of law of first impression.

In re Cement Antitrust Litig., 688 F.2d 1297, 1301 (9th Cir. 1982) (citing *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)), *aff'd sub nom. Arizona v. U.S. Dist. Court.*, 459 U.S. 1191 (1983); *see* 28 U.S.C. § 1651.

Although all five factors need not be satisfied, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive." *Executive Software North Am. v. U.S. Dist. Ct.*, 24 F.3d 1545, 1551 (9th Cir. 1994) (citations omitted). "When the district court's order is correct as a matter of law, it is obvious

that the writ of mandamus should not be issued." *Survival Sys. v. United States Dist. Court,* 825 F.2d 1416, 1418 (9th Cir. 1987), *cert. denied,* 484 U.S. 1042 (1988). Accordingly, we first examine whether the district court clearly erred.

[1] The State moved to dismiss Bean's habeas petition on the grounds that the procedural default doctrine bars federal review of his claims. "[T]he procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine." *Wells v. Maass,* 28 F.3d 1005, 1008 (9th Cir. 1994). Under the adequate and independent state grounds doctrine, the United States Supreme Court "will not review a question of federal law decided by a state court of the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). The procedural default doctrine "bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." (*Id.* at 729-30.)

[2] Not all state procedural bars are "adequate" to foreclose federal review. For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells,* 28 F.3d at 1010 (Citing *Ford v. Georgia,* 498 U.S. 411, 424 (1991) ("an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied")) (other citations omitted). The reasons for these requirements, we have explained, is that "it is grossly unfair -- and serves none

of the purposes of respect for procedural -- to forfeit an individual's constitutional because he failed to follow a rule that 'was not firmly established at the time in question.'" *English v. United States,* 42 F.3d 473, 478 (9th Cir 1994) (quoting *Ford,* 498 U.S. at 425).[2]

We therefore must decide whether the procedural rules the California Supreme Court cited in denying Bean's state habeas petition were adequate to foreclose federal review of his claims.

A

[3] The California Supreme Court denied Bean's entire state habeas petition as untimely, citing *In re Clark,* 855 P.2d 729 (Cal. 1993). In *Clark*, the California Supreme Court acknowledged that "no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases." *Clark*, 855 P.2d at 737. *Clark* attempted to explain and apply, among other things, the timeliness requirements the California Supreme Court had adopted in June 1989 for the filing of habeas petitions in capital cases. *See* Supreme Court Policies Regarding Cases Arising from

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2 . Stated differently, "the federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." *Siripongs v. Calderon,* 35 F.3d 1308, 1318 (9th Cir. 1994) (citing *Johnson v. Mississippi,* 486 U.S. 578, 587 (1988) ("a state procedural ground is not adequate unless the procedural rule is strictly or regularly followed")) (other citation omitted), *cert. denied,* 115 S.Ct. 1175 (1995).

Judgments of Death, In California Rules of Court--State 745-46 (199) (the "Standards"). Under the Standards, a habeas petition filed within 60 days (later extended to 90 days) after the final due date of the petitioner's reply brief on direct appeal is presumed timely. Petitions filed more than 60 or 90 days after the final due date must establish the absence of substantial delay or good cause for the delay.[3]

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3 . The pertinent Standards provide:

> 1. Timeliness standards
>
> 1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed without substantial delay.
>
> 1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 [later 90] days after the final due date for the filing of appellant's reply brief on the direct appeal.
>
> 1-1.2. A petition filed more than 60 [later 90] days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information

[4] The issue before us is whether California's timeliness requirements were firmly established and regularly followed at the time of Bean's purported procedural default. There is no dispute that Bean's default, if any, would have occurred before *Clark* was

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indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3 Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn.1, 220 Cal.Rptr. 382, 708 P.2d 1260), the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

Standards at 745-46.

decided. The State conceded as much before the district court,[4] and does not argue otherwise here.

[5] The State does argue at length that California courts regularly and consistently applied the timeliness procedural bar even before *Clark*.[5] We recently concluded otherwise, however, in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). In *Morales*, we found "so much variation in application of California's timeliness requirements before *Clark* that . . . no discernible clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal." *Id.* at 1391. Since California's timeliness requirements were not "clear, consistently applied, and well established" before *Clark*, they could "not serve as an adequate and independent state ground sufficient to support a procedural default." *Id* at 1393.

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4 . At oral argument, the magistrate judge asked petitioner's counsel the following question: "This case, of course everything was pre-*Clark*, is that not correct?" Petitioner's counsel responded that "what we are talking about is the enforcement of an old rule, we're not talking about retroactive application of a brand-new rule which would probably be inappropriate."

5 . The State also argued in its petition that even if California's timeliness requirements were not adequate pre-*Clark*, at least the rule that Ben offered some justification for his delay was adequate. In a subsequently filed erratum, the State noted that, contrary to what its petition represents, Bean did in fact attempt to justify his delay. We therefore do not reach the merits of this argument.

We express no opinion as to whether *Clark* sufficiently clarified California's timeliness requirements to render them an adequate procedural bar to federal review. *See Id.* at 1391 ("[w]e need express no opinion on whether the attempted succeeded, so that timeliness under the Standards invoked post-*Clark* would constitute an adequate and independent state ground of decision").

[6] Under *Morales,* California's timeliness rule, at least as applied to a pre-*Clark* procedural default, does not provide an adequate state ground barring federal review on the merits.[6]

B

[7] The California Supreme Court also denied thirty-nine claims on the grounds that they were, or unjustifiably were not, raised on appeal, or were waived by failure to preserve them at trial. The court cited *Clark*; *In re Harris,* 855 P.2d 391 (Cal. 1993); and *In re Waltreus,* 397 P.2d 1001 (Cal.), *cert. denied,* 382

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6. The State also argued that California's successive petition bar was adequate to preclude federal review in this case. In *Siripongs,* we held that California's pre-*Clark* successive petition standards were not adequate because they were not consistently enforced. We need not examine *Clark's* new standards regarding successive habeas petitions since Calderon acknowledged in his subsequently filed erratum that Bean has filed only one petition. We also express no opinion regarding the application of California's timeliness rules to post-*Clark* successive petitions.

U.S. 853 (1965), but did not indicate which bar applied to which claims.

[8] California's *Waltreus* rule provides that "any issue that was *actually* raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus." *Harris,* 855 P.2d at 398. A *Waltreus* citation does not bar federal review. In *Ylst v. Nunnemaker,* 501 U.S. 797 (1991), the Supreme court explained that *Waltreus* stands for the "ordinary state rule barring relitigation of claims raised on direct appeal," not a ruling on the merits nor a procedural default. *Id.* at 806. As such, 'a *Waltreus* denial on state habeas has no bearing on [the petitioner's] ability to raise a claim in federal court." *Forrest v. Vasquez,* 75 F.3d 562, 564 (9th Cir. 1996) (citing *Nunnemaker,* 501 U.S. at 805).

[9] The State argues, nonetheless, that the procedural bar of *In re Dixon,* 264 P.2d 513 (Cal.1953), discussed in *Harris,* is adequate to preclude federal review. The *Dixon* rule "generally prohibits raising an issue in a postappeal habeas corpus petition when that issue was not, but could have been, raised on appeal." *Harris,* 855 P.2d at 395 n.3.

Whether the *Dixon* rule was sufficiently clear and consistently applied at the time Bean filed his direct appeal is open to some question. *See Deere v. Calderon,* 890 F. Supp. 893, 901 (C.D. 1995) (federal habeas claims foreclosed based on *Dixon* rule); *Odle v. Calderon,* 884 F. Supp. 1404, 1413 (N.D. Cal. 1995) ("the *Dixon* procedural rule has not been uniformly and regularly applied by the California Supreme Court"); *Karis v. Vasquez,* 828 F. Supp. 1449, 1467-68 (E.D. Cal. 1993) (*Dixon* rule merely discretionary policy and thus not adequate).

[10] We need not resolve the issue here, however, since the California Supreme Court's order provides no basis upon which to apply the *Dixon* rule, if adequate, to Bean's claims. The order, which we agree with the district court is ambiguous, does not specify which of Bean's thirty nine-claims the court rejected under *Waltreus,* and which it rejected under *Harris/Dixon.* "[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review." *Morales,* 85 F.3d at 1392 (citing *Siripongs v. Calderon,* 35 F.3d 1308, 1317-18 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 1175 (1995)). The district court properly declined to dismiss these claims.

Since the district court's order was correct as a matter of law, we need not address the other four *Bauman* factors.

IV

For the foregoing reasons, the State's petition for a writ of mandamus is denied. The district court shall consider Bean's habeas petition on its merits.

PETITION DENIED.

APPENDIX C

FILED
NOV 17, 1995
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY CORNELL BEAN, Petitioner, v. **ARTHUR CALDERON,** Respondent.	Civ. S-90-0648 EJG GGH DEATH PENALTY CASE FINDINGS AND RECOMMENDATIONS

Respondents' motion to dismiss, filed July 18, 1995, came on for hearing October 12, 1995, before the undersigned. Andrea M. Miller and Andrew S. Love appeared for petitioner. Clayton S. Tanaka and Harry Columbo appeared for respondent. Having reviewed the motion and the documents in support and opposition and heard the arguments of counsel, the court has determined that respondent's

motion to dismiss for procedural default should be denied.

BACKGROUND

In July, 1981 a jury convicted petitioner of the murders of Beth Schatz and Eileen Fox. Petitioner was sentenced to death for the murder of Beth Schatz and to life without possibility of parole for the murder of Eileen Fox.

On September 19, 1988, the California Supreme Court affirmed petitioner's convictions on appeal. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988), cert. denied 494 U.S. 1038 (1990). After the California Supreme Court relieved petitioner's state-appointed counsel in April, 1990, petitioner, acting in propria personam, applied in May 1990 to this court for a stay of execution and for the appointment of counsel. On July 26, 1990, this court appointed counsel to represent petitioner. Counsel

filed in this court on July 18, 1991, a petition for writ of habeas corpus.

On September 26, 1991, this court issued its order staying the case, allowing petitioner to exhaust his state remedies. On May 26, 1994, counsel for petitioner filed a state petition for writ of habeas corpus. On February 22, 1995, the California Supreme Court denied the state petition without issuing an order to show cause and without holding an evidentiary hearing.

The state supreme court denied the state habeas petition on exhaustion on three grounds:

1. all claims were denied as untimely raised;

2. 39 claims were barred on account of the failure to raise them properly on direct appeal or at trial;

3. 10 claims were denied on their merits as failing to state a prima facie case entitling petitioner to

relief (whether based on state law or federal law was not revealed).

Petitioner notified the court of exhaustion of remedies, re-opened this proceeding, and filed an amended petition for writ of habeas corpus on March 22, 1995. Respondents filed a preliminary answer on June 8, 1995, and on July 21, 1995, filed the present motion to dismiss based on procedural default. Because it is an affirmative defense and because respondents move for dismissal, respondents bear the burden of establishing that California's procedural default rules are adequate to bar federal review. Karis v. Vasquez, 828 F.Supp. 1449, 1463 n. 21 (E.D. Cal. 1993). The court discusses in turn each ground of denial stated by the California Supreme Court.

PROCEDURAL DEFAULT

1. Legal Standards

Based on concerns of comity and federalism, federal courts will not review federal questions presented by a habeas petition if a prior state court decision denying relief to the petitioner rests on a state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038 (1989). A federal court faced with an ambiguous state court decision presumes that there is no bar to the federal court's consideration of federal claims " . . . unless the last state court rendering a judgment on the case clearly and expressly states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263 (citations omitted). Federal questions should be reached only "when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases

where a federal court has good reason to question whether there is an independent and adequate state ground for that decision." Coleman at 735.

To be independent of federal law, a state procedural practice must not "depend upon an antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, a state procedural practice must be "clearly defined," id. at 1462, "firmly established," James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-1836 (1984), and "regularly followed," Id. A rule is regularly followed if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 1217 (1989). The Ninth Circuit has explained the adequate state ground requirement as follows:

> [T]he procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and

> consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon, 959 F.2d at 1461 (citations omitted).

If the state court decision is supported by an independent and adequate state ground, the federal court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. 15 1043 (citing Murray v. Carrier, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644 (1986)). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1469-1470 (1991)

(quoting Murray, 477 U.S. at 488). Examples of cause include showings "that the factual or legal basis for a claim was not reasonably available to counsel," "that some interference by officials made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488, 106 S.Ct. at 2645. The Court has limited the "fundamental miscarriage of justice" exception to those who can show actual innocence, id. at 490; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993), including actual innocence of the death penalty, Smith v. Murray, 477 U.S. 527, 537-38, 106 S.Ct. 2661 (1986); Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).

2. Analysis

a. Timeliness

In the instant case, the California Supreme Court, citing In re Clark, 5 Cal.4th 750, 774-775, (21 Cal.Rptr.2d 509) (1993), issued an opinion

which first denied petitioner's entire state habeas petition "on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims."

Even respondent concedes that the California Supreme Court's overall timeliness ruling is overbroad. The ruling seemingly encompasses even those claims that had been timely raised on direct appeal, but which were "re-exhausted" in the state habeas petition filed after initial proceedings in this court. Of course, the fact that petitioner has exhausted claims "too much" has never been held to be a procedural bar to a claim that is otherwise devoid of procedural taint. However, because of the court's findings with respect to the remainder of the

"untimely" claims, it is not necessary to segregate the old claims from the new ones.

A brief review of the history of the California courts' timeliness bar is instructive in determining this basis for the court's ruling. The California courts have generally disfavored unduly delayed petitions. See, e.g., People v. Jackson, 10 Cal.3d 265, 110 Cal.Rptr. 142 (1973); In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633 (1970). However, the early cases provided little guidance as to just what constituted undue delay or what would excuse a finding of undue delay. In re Stankewitz, 40 Cal.3d 391, 396-97 n. 1, 220 Cal.Rptr. 302 (1986), the court stated that a petitioner must "point to particular circumstances sufficient to justify substantial delay." However, the court did not define how much delay was "substantial."

In 1989, the California Supreme Court established standards, including timeliness standards,

for filing habeas corpus petitions in capital cases. Those standards require appellate counsel to investigate possible bases for a habeas petition. California Supreme Court, Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Cases, 50 Cal.3d 1-4 (Dec. 1993). A petition filed within 60 (now 90) days of the filing of the appellate reply brief is presumed timely. Id.

Petitioners who did not file within this time period could establish an absence of substantial delay in two ways. First, they could provide specific facts showing the petition "was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual bases for the claim and became aware, or should have become aware, of the legal basis for the claim." Standard 1-1.2

(emphasis in original). Second, petitioners could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 [the final date of Stankewitz] . . . the petition was filed within a reasonable time after that date." Standard 1-1.3. Petitioners failing to meet these standards could seek to demonstrate "good cause by showing particular circumstances sufficient to justify substantial delay." Standard 1-2.

In 1993, the California Supreme Court clarified its timeliness rules and set forth specific exceptions to the timeliness bar. In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). The court reviewed the state procedural limitations applicable to petitions for habeas corpus, including the rules applicable to delayed petitions, repeated petitions, and piecemeal presentation of claim. In describing prior state

practice limiting habeas corpus relief, the court stated: "because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted." Id. at 763.

The Ninth Circuit, agreeing that no clear state procedural guidelines existed, has held that, at least prior to 1993, California courts inconsistently applied the state timeliness standards. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert denied, 115 S.Ct. 1175 (1995); see also, Karis v. Vasquez, 828 F.Supp. 1449, 1463 (E.D. Cal. 1993).

The California Supreme court cited Clark in the instant case as a bar to petitioner's state habeas petition. In doing so, the Court retroactively applied Clark because, by definition, the timeliness bar means petitioner should have raised the claims earlier. The problem is that, although petitioner filed the state habeas petition at issue in this case after Clark, at the

time petitioner should have raised the claims, i.e., within a reasonable time after the final date of Stankewitz, Clark was not the law.[1/] The question then is whether the federal court should respect the state court's retroactive application of its Clark timeliness rules to bar consideration of petitioner's claims.

Deere v. Calderon, 890 F.Supp. 893 (C.D. Cal. 1995) briefly addresses the application of Clark to a procedural default which took place prior to the Clark opinion. In Deere, petitioner filed a first petition prior to Clark and a second petition after Clark. The second petition had been denied as untimely by the California Supreme Court, citing Clark.

1/ Petitioner's conviction was affirmed on appeal on September 19, 1988, at a time when both the pre-Clark and pre-Standards procedural rules were in effect. Stankewitz was the applicable law concerning timeliness of state habeas petitions. Petitioner filed his state "exhaustion" habeas petition prior to the Clark decision as well.

The Deere court found that the California Supreme Court had consistently applied the Clark standards to the nine habeas petitions filed after Clark. The Deere court thus concluded that Clark's timeliness rule was adequate to bar federal review. In reaching that conclusion, the court only briefly addressed the retroactivity issue:

> It is not unfair or unjust to now honor the procedural bar in the face of the previous ruling of inconsistency in California. Clark did not change the requirements for filing state habeas petitions in California. Clark merely put petitioners on notice that previously established standards would be followed.

890 F.Supp. at 900.

In summarily determining that retroactivity was not a problem, the district court in Deere did not discuss two important points. First, it failed to consider that, as described above, the California Supreme Court itself acknowledged that its

timeliness rules were sporadically applied, and understood its opinion in Clark to mark a significant change in its use of the timeliness rules.[2/] Second, the Deere court failed to examine the retroactivity issue as applied to the law of procedural default. Most importantly in the last respect, Deere is contrary to Supreme Court and Ninth Circuit authority.

A litigant must have a fair opportunity to comply with known procedural rules. In order to provide this fair opportunity, the state procedural bar at issue is the one in place at the time the claim

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2/ Clark itself is inconsistent in its characterization of the past fidelity of the state courts to apply procedural bar to state habeas petitions on account of untimeliness. At one point, Clark intimates that Stankewitz simply affirmed the longstanding practice that required petitions to be timely filed, Clark, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 530-531; at another, Clark implicitly concedes that the Stankewitz bar was not consistently applied. Id. at 786, 21 Cal.Rptr.2d at 533. In addition, insofar as the discovery of new claims is concerned, Clark expressly concedes that prior to 1989, counsel had no obligation to investigate the possibility of new claims. Id. at 783, 21 Cal.Rptr.2d at 531.

should have been raised. Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 857 (1991). In Ford, the state supreme court had established a new procedural rule governing the timely assertion of a Batson claim. The state court then retroactively applied the new rule to bar the petitioner's Batson claim. The Supreme Court found that since the rule was not firmly established at the time the petitioner should have raised the claim, it was inadequate to bar federal review. 498 U.S. at 424-25. This circuit, citing Ford, has acknowledged that the applicable procedural bar to consider is the one in effect "at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).

Respondent can legitimately argue that the above cited law permits petitioner to claim that prior to Clark, he had a "right" to file a belated state habeas petition, and that California law certainly has

never stood for that proposition. While respondent may be correct in this assertion, the issue here is whether California law was sufficiently, consistently applied in the past (pre-Clark) with respect to untimely petitions, and this court is bound by the Ninth Circuit holding that it was not. This court is further bound by the Supreme Court and Ninth Circuit holding that any procedural default must be judged at the time the alleged default was incurred. Because any potential default herein was incurred during the pre-Clark period (see footnote 1, supra), no procedural default (bar) may be entered on account of an "untimely" petition.[3/]

B. Failure To Raise Claim On Direct Appeal Or At Trial

3/ Petitioner argues in opposition to the motion to dismiss that California's procedural rules remain as unclear after Clark as before. For purposes of this motion, this court need not decide that issue.

Citing In re Harris, 5 Cal.4th 813, 826 (21 Cal.Rptr.2d 373) (1993), Clark and In re Waltreus, 62 Cal.2d, 218, 225 (42 Cal.Rptr. 9) (1965), the California Supreme Court rejected 39 claims as "also procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." This ambiguous portion of the opinion does not indicate which of the cases cited as presenting procedural bars applies to which claim, or which claims are barred by the appeal or trial defaults.

In re Waltreus does not present a procedural bar to consideration of a claim by a federal court. Waltreus stands for the California rule that issues resolved on appeal will not be reconsidered in a petition for habeas corpus. The California Supreme Court cites to Waltreus when a state petitioner has attempted to raise issues in state habeas corpus

proceedings that he already raised on direct appeal. Waltreus holds that "habeas corpus ordinarily cannot serve as a second appeal." Id. As the Supreme Court clearly stated in Ylst v. Nunnemaker, 501 U.S.797, 806, 111 S.Ct. 2590, 2596 (1991), all Waltreus stands for is the "ordinary state rule barring relitigation of claims raised on direct appeal"; it is uninformative of the issue of procedural bar. Id. Therefore, a citation to Waltreus does not mean that this claim is procedurally barred.

The California Supreme Court's rule precluding consideration in a petition for habeas corpus of a claim which could have been, but was not raised on appeal, has been known as the Dixon rule. See In re Dixon, 41 Cal.2d 756, 759 (1953). In re Harris, cited by the California Supreme Court in denying petitioner's state habeas petition announced the court's intention to apply the Dixon rule more

consistently in the future. However, as previously discussed, the procedural practice applicable to petitioner in this instance would be the one in existence at the time of his direct appeal. At the time of Bean's direct appeal, the Dixon rule was not adequate to preclude federal court consideration of a claim because it was not consistently applied by the California Supreme Court. Odle v. Calderon, 884 F.Supp. 1404, 1413 (N.D. Cal. 1995); Karis, 828 F.Supp. at 1467.

Finally, although there are several trial level procedural defaults that most probably have been consistently followed in the past, e.g., failure to object to prosecutorial misconduct, the California Supreme Court did not identify which claims were subject to what default, or what the specific default problem was with a particular claim. This court is not in the

position to speculate on behalf of the California Supreme Court.

PRIMA FACIE CASE

In denying petitioner's state habeas petition, the California Supreme Court, again citing Clark at (797-798) rejected ten claims as having been considered on the merits, and that the claims failed to state a prima facie case for relief. As to these claims, respondent, citing Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) argues unpersuasively that they are unexhausted. Respondent asserts that because the state court found that petitioner failed to state a prima facie case with respect to these ten claims, petitioner has not exhausted those claims. Respondent does not specify whether he contends petitioner has legally or factually failed to exhaust the claims which the California Supreme Court has found not to state a prima facie case. The statement of the California

Supreme Court that petitioner has not stated a prima facie case (a matter not considered at all by Jackson v. Cupp), means exactly what it says, , the court has considered the matters on the merits and has found them wanting. The denying of a claim on the merits has nothing to do with exhaustion except to indicate that exhaustion has occurred.4/ The state court was

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4/ Perhaps respondent was confusing the situation here with the Jackson v. Cupp statement that where state remedies remain available, exhaustion has not been satisfied. However, this is not the case here. The ten claims were considered on the merits and were denied. There are no available state remedies remaining for these claims. It is also possible that respondent is confusing the In re Swain, 31 Cal.2d 300, 209 P.2d 793 (1934), doctrine with the situation here. Swain stands for the proposition that the petitioner has failed to state the facts clearly enough for the state supreme court to rule on the merits, and by definition, the court has therefore not ruled on the merits. See, Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986). Such unclear claims are not exhausted. However, again, the state supreme court did reach the claims on the merits.

In the case at bar, respondent would have this court send the ten "unexhausted" claims back to state court for further determination on the merits which inevitably would result in another ruling that the claims fail to state a prima facie claim, which would then

presented with the "opportunity" to rule on the merits of the claims, Jackson v. Cupp, 693 F.2d at 869, and it did so; such claims are exhausted. Id. Moreover, such a holding as was made by the state supreme court in this case (denial on the merits for failure to state a prima facie case) is inconsequential to the federal courts for two reasons: (1) the state supreme court did not specify whether it denied the claims based on state or federal law; (2) if based on federal law, the federal court is not bound by such a general statement in any event (Jackson v. Cupp, 693 F.2d at 869).

Therefore, the state supreme court denial of certain claims on the merits does not implicate failure to exhaust or procedural default.

FAILURE TO PRESENT A FEDERAL CLAIM

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require another remand for exhaustion, which would be followed by yet another ruling. . . .Nothing in habeas corpus law requires such a volley.

Respondent's argument that certain claims do not present a federal claim is premature. The court will not make this determination at the present time.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to dismiss be denied in its entirety.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **twenty (20)** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure

to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 13, 1995.

UNITED STATES MAGISTRATE JUDGE

APPENDIX D

FILED
March 29, 1995
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY CORNELL BEAN, Petitioner, v. ARTHUR CALDERON, et al., Respondents.	Civ. S-90-0648 WBS GGH ORDER DEATH PENALTY CASE

Respondents seek dismissal of petitioner's habeas corpus action. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302(c)(17).

On November 17, 1996, the magistrate judge filed findings and a recommendation to deny respondent's motion to dismiss in its entirety. On December 12, 1995, respondents filed objections to the

findings and recommendation. On December 21, 1995, petitioner filed a reply.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 304, this court reviews the magistrate judge's findings and recommendation de novo. The court finds the findings and recommendation are supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation filed November 17, 1995, are adopted; and

2. Respondents' motion to dismiss is denied.

DATED: March 28, 1996

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

(3) No. 96-1355

MAR 26 19

CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, *Petitioner*,
v.
ANTHONY CORNELL BEAN, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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MAR 26 1997
THE CLERK
SUPREME COURT, U.S.

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QUESTION PRESENTED

Whether this Court should permit a procedural default based on a state court's discretionary procedural "guidelines", which have been determined to be arbitrarily and inconsistently applied, to bar federal habeas corpus review.[1]

---

[1] The California Supreme Court's timeliness guidelines are set forth in Calderon v. United States District Court For the Eastern District Of California, 96 F.3d 1126, 1130 n. 3 (9th Cir. 1996), attached as Appendix B to the petition.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Anthony Cornell Bean (hereinafter "Bean"), respectfully requests that the Court deny the petition for writ of certiorari seeking review of the denial by the Ninth Circuit Court of Appeals of petitioner's petition for writ of mandamus which sought a direction to the district court to vacate its order denying petitioner's motion for summary dismissal.

The opinion of the Court of Appeals affirming the district court's order is reported at Calderon v. United States District Court For the Eastern District of California, 96 F.3d 1126 (9th Cir. 1996) [hereinafter cited as "Calderon"]. The district court's order that denied petitioner's motion for summary dismissal is unreported and is reproduced and attached as Appendix D to the petition.

STATEMENT OF THE CASE

On July 20, 1981, Bean was sentenced to death upon his conviction for the murder of Beth Schatz, and he was sentenced to state prison for a term of life without possibility of parole for the murder of Eileen Fox. On October 26, 1981, the California Supreme Court appointed counsel to represent Bean on his automatic appeal.[2] The judgment and sentence

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[2] Appointment orders entered did not refer to habeas corpus proceedings because habeas primarily was a post-affirmance remedy at that time. See generally, D. Fischer & R. Lynn, Appeals and Writs in Criminal Cases § 2.116 (C.E.B. 1982). After Bean's automatic appeal was denied, the California Supreme Court altered the responsibilities of appellate counsel to include "any related habeas proceedings."

were affirmed on appeal on September 19, 1988. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988).

On June 6, 1989, the California Administrative Office of the Courts issued a news release entitled "Supreme Court Adopts Policies Regarding Cases Arising From Judgments of Death." A.O.C. News Release # 40 (June 6, 1989). Included among these "policies" was the Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions (hereinafter "Standards"). Under the provisions of Standard 1, entitled "Timeliness Standards," the scope of appellate appointments was expanded, with apparent retroactive as well as prospective effect, to include the "duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." Bean's appellate counsel's appointment as counsel of record was, however, vacated by the California Supreme Court on April 4, 1990, at a time before any petition for writ of habeas corpus in state court on Bean's behalf was filed, and Bean's first and only state-court petition was filed after appointment of new counsel in federal court.

On July 26, 1990, the district court granted Bean's request for appointment of counsel to prosecute a federal habeas corpus proceeding on his behalf, and appointed present counsel, who had not represented Bean in state court proceedings. On July 18, 1991, counsel for Bean filed a federal petition for writ of habeas corpus in the district court. On July 30, 1991, the petitioner filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

See e.g., People v. Dent, No. S024645 (Cal. Jan. 20, 1995); People v. Sapp, No. S023628 (Cal. Jan. 19, 1995).

On September 26, 1991, the district court vacated petitioner's motion for summary adjudication, and remanded Bean to state court to exhaust state remedies on the ground that all but one of his claims was unexhausted. On October 31, 1991, federal counsel was appointed by the California Supreme Court for purposes of filing Bean's state habeas corpus petition.

On July 23, 1993, the California Supreme Court issued its decision in In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993), in which a review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to a simple, but important, conclusion: "no clear guidelines have emerged in our past cases." Id. at 763, 21 Cal.Rptr.2d at 517. The Clark court "attempted to explain and apply, among other things, the timeliness requirements the California Supreme Court had adopted in June 1989 for the filing of habeas petitions in capital cases." Calderon, supra, 96 F.3d at 1130.

Bean filed his first and only petition for writ of habeas corpus in the California Supreme Court on June 1, 1994. On June 6, 1994, the California Supreme Court requested that petitioner file an informal response to the petition pursuant to Rule 60 of the California Rules of Court, and that Bean file a reply to the informal response.

Petitioner grossly misrepresents the proceedings in this case when it states that the timing of Bean's filing of the state petition was "[w]ithout explanation." Petition, at 3, 6, 14, 19. Bean, in both the state petition and in the reply to petitioner's informal response provided extensive justifications for any delay in the filing of the state petition. Petitioner, in the petition for writ of mandamus filed in the Court of Appeals, made a similar misrepresentation, stating that Bean failed to justify the delay in filing the state petition. However, as the Court of Appeals opinion acknowledged: "In a subsequently filed erratum, the State noted that, contrary to what its petition

represents, Bean did in fact attempt to justify his delay." Calderon, supra, 96 F.3d at 1130 n. 5. Nevertheless, petitioner repeats the error here that it ultimately corrected below.

On February 23, 1995, the California Supreme Court denied Bean's state petition as follows:

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which [Bean] lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims. (In re Clark (1993) 5 Cal.4th 750, 774-775.)[3]

Appendix A to Petition.

In its order denying habeas relief, the California Supreme Court also found thirty-nine of Bean's claims to be procedurally barred on the grounds that they

> were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial. (In re Harris (1993) 5 Cal.4th 813, 826; In re Clark (1993) 5 Cal.4th 750, 765; In re Waltreus (1965) 62 Cal.2d 218, 225. See also People v. Bean (1988) 46 Cal.3d 919).

Id.

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[3] The California Supreme's order is attached to the petition as Exhibit A.

The Court did not, however, specify in its order which specific claims were not raised on appeal, which claims could have been raised on appeal, and which claims were waived for failure to preserve them at trial. Finally, the California Supreme Court addressed ten claims on their merits, and denied them for failing to state a prima facie case. In denying these claims, the California Supreme Court order cited to In re Clark, supra, 5 Cal.4th at 797-98, 21 Cal.Rptr.2d at 540-41. These cited pages of the Clark decision pertain to "exceptions to the procedural bar against successive or untimely petitions." Id. In Clark, the Court stated that the "fundamental miscarriage of justice" exception to procedural bar is applied where the Petition alleges:

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [footnote omitted] (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; [footnote omitted] (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [footnote omitted] (4) that the petitioner was convicted or sentenced under an invalid statute.

Id.

These are precisely the kinds of claims that the California Supreme Court considered on the merits in Petitioner's case. It is therefore abundantly clear from the Order's citation to the exceptions enumerated in Clark, that whether or not the Court determined that the petition was

untimely, it applied the miscarriage of justice exception so as not to procedurally bar these ten claims.

Bean filed a federal petition for writ of habeas corpus on March 22, 1995. On July 21, 1995, petitioner filed a motion to dismiss the petition on the ground that the California Supreme Court's denial of the state habeas petition constituted a procedural bar to petitioner's claims. Oral argument was held on the motion on October 12, 1995. On November 17, 1995, the magistrate judge made findings that the state denial was not an adequate state bar, and recommended denial of the motion to dismiss. A copy of these findings is attached to the petition as Appendix C.

Petitioner complains in its Statement of the Case that the magistrate judge refused to apply Clark or Harris to Beans's state habeas petition "even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims . . .". Petition for Writ of Certiorari, at 5. However, Petitioner fails to acknowledge that it conceded at oral argument before the magistrate judge and before the Court of Appeal that Bean's default, if any, would have occurred before Clark and Harris were decided. See Calderon, supra, 96 F.3d at 1130 & n. 4.

On March 29, 1996, the district court filed an order adopting the magistrate judge's findings in their entirety and denying petitioner's motion to dismiss.

An evidentiary hearing on several of petitioner's claims was held before the magistrate judge, beginning on May 20, 1996, and concluding on May 30, 1996.[4]

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[4] This fact is omitted from petitioner's Statement of the Case. The same omission was corrected in petitioner's Erratum filed in connection with the writ proceedings in this case.

On July 18, 1996, petitioner filed a petition for writ of mandate and/or prohibition in the Ninth Circuit Court of Appeals seeking an order directing the district court to vacate its order denying the petitioner's motion for summary dismissal. Petitioner did not seek review of the district court's order by interlocutory appeal in March when the district court acted to deny the motion, instead waiting until after the evidentiary hearing concluded in May to file its petition for writ of mandate and/or prohibition.

In an opinion filed on September 20, 1996, the Court of Appeals denied the mandamus petition. Calderon, supra, 96 F.3d 1126. On November 26, 1996, petitioner's petition for rehearing was denied.

In its Statement of the Case, petitioner ignores significant developments in this case which render a granting of certiorari in this case virtually moot. On January 23, 1997, the magistrate judge issued Findings and Recommendations with regard to the disposition of Bean's habeas corpus petition. The magistrate recommended the denial of relief with regard to Bean's guilt phase claims, but recommended the granting of relief with regard to two of Bean's penalty phase claims: Ineffective Assistance of Counsel and Bailiff/Juror Misconduct. Objections to the magistrate's findings and recommendations have been filed by the parties, and the case is pending before the district court judge. Petitioner also fails to note that the two claims on which the magistrate has granted relief were not procedurally defaulted by the California Supreme Court, but were two of the ten claims, discussed above, that the Court denied on the merits under an exception to its default rules. Thus, assuming arguendo that the California Supreme Court's procedural bars are found to be adequate and independent, such a ruling likely will have no impact on the ultimate disposition of Bean's claims.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals properly determined that the state court's invocation of its timeliness "policies" to deny Bean's first and only petition was "inadequate" to bar federal court review. The timeliness policies of the California Supreme Court are impermissibly vague, entirely discretionary, and they are applied arbitrarily and haphazardly. Under long-standing doctrine of this Court, each of these reasons, considered individually, compels the conclusion that Bean is not barred from federal habeas corpus review of his claims.

Petitioner resorts to a distortion of the record in this case and a misrepresentation of federal and California law in its attempt to rescue the state's court's procedural default that was applied to Bean's state petition. First, petitioner repeatedly claims that Bean failed to justify any delay in filing the state petition, whereas the Court of Appeals recognizes that, "Bean did in fact attempt to justify his delay." Calderon, supra, 96 F.3d at 1130 n. 5. Petitioner also argues that the Ninth Circuit erroneously determined that the default at issue occurred prior to Clark. However, as the Court of Appeal correctly notes, petitioner conceded this point before the district court. Id. at 1130 & n. 4.

Petitioner is seeking review of the denial of a petition for writ of mandate and/or prohibition. Petitioner fails to acknowledge that the magistrate judge has already recommended the denial of relief on all of the claims which were denied on procedural grounds by the California Supreme Court and recommended the granting of relief on two claims which the California Supreme Court denied on the merits under its own exceptions to procedural default. Given the procedural posture of this case, it makes little sense for this Court to intervene at this stage of the proceedings because allowing the case to proceed to its final disposition below may

render petitioner's contentions moot. If the magistrate judge's recommendation to deny relief on the merits of all of the otherwise procedurally barred claims is adopted by the district court judge and affirmed by the Court of Appeals, there will be no issue with regard to procedurally defaulted claims since those claims would all have been denied.

Furthermore, petitioner's reliance on Ninth Circuit authority for the principle that there is a conflict within the Ninth Circuit is not only meritless but is not a basis upon which this Court ordinarily grants certiorari. In addition, petitioner's attempt to argue the consistency of the California Supreme Court's pre-Clark timeliness requirements is unsupported and contrary to the empirical data considered by the court below.

Finally, petitioner's "preemption" formulation of the doctrine for habeas corpus would render it a virtual nullity and upset this Court's carefully constructed balance of comity by allowing even the most arbitrary and haphazardly applied state procedural rules to bar federal court review.

1. The Court of Appeals Opinion is Consistent with this Court's Precedent as well as the Precedent of the Ninth Circuit and Other Federal Circuits

Under the adequate and independent state ground doctrine, this Court has no jurisdiction on direct review of a state court decision resolving federal questions if the judgment rests on a state law ground that is "independent" of the federal question and "adequate" to support the judgment. See e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872).

The procedural default doctrine governing federal habeas corpus cases is derived from this doctrine, see Wainwright v. Sykes, 433 U.S. 72 (1977); Coleman v.

Thompson, 501 U.S. 722 (1991), and is applied in the same fashion, Harris v. Reed, 489 U.S. 255 (1989), with one important difference. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." Coleman v. Thompson, supra, 501 U.S. at 730. In the context of habeas corpus, the application of the independent and adequate state ground doctrine is jurisprudential and "grounded in concerns of comity and federalism." Id. at 730-31; Wainwright v. Sykes, supra, 433 U.S. at 83. Thus, the habeas corpus decisions of this Court repeatedly emphasize that a state procedural default will bar federal habeas corpus relief only where the state ground for decision is "adequate," see, e.g., Harris v. Reed, supra, 489 U.S. at 261-62; Coleman v. Thompson, 501 U.S. at 736 ("federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds"), and cite without hesitation direct review cases setting forth criteria for judging adequacy. See, e.g., Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989) (upholding state rule where state court faithfully applied rule with only few exceptions); Harris v. Reed, supra, 489 U.S. at 261 n.6 (expressly incorporating the Johnson v. Mississippi, 486 U.S. 578 (1988), "even-handed application" test of adequacy that was applied by the Ninth Circuit in the instant case.).

In denying petitioner's mandamus petition, the Court of Appeals predicated its decision on this Court's jurisprudence. The Court of Appeals stated that for a procedural bar to apply, "'a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.'" Calderon, supra, 96 F.3d at 1129, quoting Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994), citing Ford v. Georgia, 498 U.S. 411, 424 (1991)("an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly

established and regularly followed' by the time as of which it is to be applied")(other citations omitted). The Court of Appeals explained that "'it is grossly unfair -- and serves none of the purposes of respect for procedural rules -- to forfeit an individual's constitutional claim because he failed to follow a rule that 'was not firmly established at the time in question.'" Id. (quoting English v. United States, 42 F.3d 473, 478 (9th Cir. 1994), quoting Ford, supra, 498 U.S. at 425). The court below also cited Johnson v. Mississippi, 486 U.S. 578, 587 (1988) for the proposition that "a state procedural ground is not adequate unless the procedural rule is strictly or regularly followed." Calderon, supra, 96 F.3d at 1129 n. 2.

It is therefore without question that the Court of Appeals' analysis of the state procedural bar at issue in this case was grounded in well-established precedent. Nevertheless, petitioner argues that the Court of Appeals decision in this case conflicts with and misapplies Ninth Circuit precedent, and cites one Ninth Circuit case to support this contention: Woratzeck v. Stewart, 97 F.3d 329 (9th Cir. 1996). Given that Woratzeck does not involve state procedural default doctrine, but rather addresses the application of an unconstitutionally vague aggravating factor, it is unclear how this case is relevant or how the Ninth Circuit's decision in the instant case may conflict with it.

Further, the Court of Appeals relied in this case on its previous holding in Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S.Ct. 500 (1996). In Morales, the Court reviewed undisputed empirical data regarding the California Supreme Court's treatment of habeas corpus petitions and concluded that there was "so much variation in application of California's timeliness requirements before Clark that we conclude that no discernible clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal." Id. at 1391 (quoted in Calderon, supra, 96 F.3d at 1130).

Far from being in conflict, the Ninth Circuit has been unwavering in its analysis and application of procedural default doctrine with respect to California procedural rules. See e.g., Hayes v. Calderon, 103 F.3d 72 (9th Cir. 1996); Morales v. Calderon, supra; Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied __ U.S. __, 115 S. Ct. 1175 (1995).[5]

Notably absent from petitioner's analysis is that every federal circuit has held that in a habeas corpus proceeding only those state rules that are consistently enforced are adequate to support a finding of procedural default. See e.g., Breest v. Perrin, 655 F.2d 1, 3 (1st Cir.), cert. denied, 454 U.S. 1059 (1981); Wedra v. LeFevre, 988 F.2d 334, 340 (2d Cir. 1993); Reynolds v. Ellingsworth, 843 F.2d 712, 719 (3d Cir.), cert. denied, 488 U.S. 960 (1988); Smith v. Dixon, 14 F.3d 956, 972 (4th Cir.), cert. denied, __ U.S. __, 115 S. Ct. 129 (1994); Hill v. Black, 932 F.2d 369, 373 (5th Cir. 1991); Warner v. United States, 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 1314 (1993); Rosa v. Peters, 36 F.3d 625, 633 (7th Cir. 1994); Grubbs v. Delo, 948 F.2d 1459, 1462-1463 (8th Cir. 1991), cert. denied, __ U.S. __, 113 S. Ct. 109 (1992); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert. denied, __ U.S. __, 115 S. Ct. 1175 (1995); Klein v. Neal, 45 F.3d 1395, 1398 (10th Cir. 1995); Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 776 (1996). In fact, no circuit ever has rejected consistency of application as a test of adequacy.

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[5] In any event, even if such a conflict existed within the Ninth Circuit that would not provide appropriate grounds for the granting of certiorari. United States Supreme Court Rule 10.1, cited by petitioner, pertains to conflicts between a federal court of appeal and other circuit courts -- not between two cases within the same circuit.

2. California's Timeliness Rules Were Not Consistently Applied Prior to Clark

Petitioner relies solely on the California Supreme Court's decision in Clark to support its contention that the timeliness procedural bar has been consistently applied. According to petitioner, then, as long as the California Supreme Court fails to state that it has been inconsistent in its application of a procedural bar, federal courts are not permitted to question the adequacy of the bar on the basis of inconsistent application. Thus, without any analysis or citation to any empirical evidence, petitioner merely asserts that application of the timeliness bar was not "infrequently, unexpectedly, or freakishly applied . . ." Petition, at 14.

However, as discussed above, in Morales the Appeals Court analyzed 35 habeas petitions filed three years or more after affirmance on direct appeal, and concluded that there was "so much variation in application of California's timeliness requirements before Clark that . . . no discernable clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal." Morales v. Calderon, supra, 85 F.3d at 1391. As the Court stated:

> It is theoretically possible, we suppose, to reconcile and explain all of the California Supreme Court decisions entertaining on the merits or rejecting as untimely petitions that are three or more years old. Those divergent decisions may indeed represent consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule. But we have no way of knowing whether that is the case. The California Supreme Court's denials of habeas petitions that Morales relies upon were accomplished by brief minute

> entries in what has been described as "post-card denial." We can discern no apparent relationship between the time of delay and the findings concerning timeliness. Nor could Morales be expected to do so.

Id. at 1392. The Court in Morales also noted that two district courts in the Circuit reached the same conclusion regarding the "standardless" and "ad hoc" nature of the timeliness bar. See Karis v. Vasquez, 828 F.Supp. 1449, 1462-1463 (E.D.Cal. 1993); Odle v. Calderon, 884 F.Supp. 1404, 1413-14 (N.D.Cal. 1995).

3. Petitioner Conceded Below That The Default, If Any, That Occurred in This Case Was Pre-Clark

Petitioner contends that the Court of Appeals' holding that the purported default in this case occurred prior to Clark is in error. Remarkably, petitioner fails to acknowledge that it conceded this issue below. As the Court of Appeals held, "There is no dispute that Bean's default, if any, would have occurred before Clark was decided. The State conceded as much before the district court [footnote omitted], and does not argue otherwise here. Calderon, supra, 96 F.3d at 1130; see id. at 1130 n. 4. Petitioner also conceded below that retroactive application of a new rule would be inappropriate. Id. at 1130 n.4.

It is clear from a review of the procedural history of Bean's state proceedings and of California's timeliness rules that the period of time when Bean could have avoided the alleged default occurred prior to the California Supreme Court's 1993 decision in Clark, at a time when the rules were unclear and inconsistently applied. See Ford v. Georgia, 498 U.S. 411, 423-25 (1991).

Bean's appellate counsel was appointed on October 26, 1981. Bean's conviction and death sentence were affirmed on direct appeal on September 19, 1988. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988). Bean's appellate counsel never filed a state habeas petition on Bean's behalf. On June 6, 1989, after Bean's case was affirmed on direct appeal and while his certiorari petition was pending before the United States Supreme Court, the California Supreme Court issued its Standards, which purported to impose upon "[a]ppellate counsel in capital cases . . . a duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." Standards 1-1.

Prior to the promulgation of the Standards and, therefore, during the pendency of Bean's appeal, counsel was under a duty to present promptly those habeas corpus claims of which he or she had actual knowledge and to justify any "substantial delay" between the time when counsel became aware of the factual and legal bases of the claim and the filing of the petition. In re Stankewitz, 40 Cal.3d 391, 396 n.1, 220 Cal.Rptr. 382, 384 n.1 (1985). Counsel did not, however, have any "express obligation . . . to investigate possible bases for habeas corpus." In re Clark, supra, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 531. The magistrate judge in this case correctly noted that California case law prior to the Standards "provided little guidance as to just what constituted undue delay or what would excuse a finding of undue delay." Findings and Recommendations, at 6, attached to Petition as Appendix C. See also Morales v. Calderon, supra, 85 F.3d at 1390. In Stankewitz, supra, the California Supreme Court stated that a petitioner must "point to particular circumstances sufficient to justify substantial delay," but did not define or explain how much delay was "substantial" or what circumstance would be sufficient to justify it. In re Stankewitz, supra, 40 Cal.3d at 396 n.1, 220 Cal.Rptr. at 384 n.1.

The Standards simply provided that habeas corpus claims must be investigated and presented "without substantial delay." Standards 1-1. In their original form, the Standards also provided that petitions filed within 60 days of the appellate reply brief presumptively suffer from no substantial delay.[6] Standards 1-1.2. Those petitioners who did not file a petition within the presumptively timely period following the reply brief could establish an absence of substantial delay by providing facts showing the petition was filed within a "reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim . . . ". Standards 1-1.2. Alternatively, petitioner could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 [the date of finality of In re Stankewitz] . . . the petition was filed within a reasonable time after that date." Standards, 1-1.3.

In July 1993, while petitioner was in the process of exhausting state remedies, the California Supreme Court issued its opinion in In re Clark, supra, which purported to clarify and explain its requirements under the Standards. See Morales v. Calderon, supra, 85 F.3d at 1391. In Clark, the California Supreme Court acknowledged that, under the Standards, the reasonableness of any asserted delay was assessed from the date counsel or petitioner actually "became aware of information indicating a factual basis for the claim." In re Clark, supra, 5 Cal. 4th at 785, 21 CalRptr.2d at 532. The Court stated that an affirmative duty of "diligence in discovering both the factual and legal bases for habeas corpus

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[6] A September 1990 amendment increased this period from 60 to 90 days. In any event, petitioner's reply brief on direct appeal had been filed well before the Standards went into effect.

claims" was intended in promulgating the Standards. Id. at 785 n.21, 21 Cal.Rptr.2d at 532 n.21. To dispel the obvious confusion created by the Standards, the Court modified the wording to reflect the Court's original intent. Id. Consequently, after the Clark decision, "undue delay" was to be measured from the time counsel should have been aware of a ground for relief as opposed to when counsel actually became aware. Knowledge of a claim was said to exist when counsel was in possession of facts sufficient to plead a prima facie case.

Clearly the imposition of an affirmative duty on appellate counsel to investigate habeas corpus claims established in Clark was not the rule during the twelve years between the commencement of Bean's appeal and the Clark decision, or in the five years between the time of the affirmance of Bean's conviction and Clark. Thus, Bean had no opportunity to comply with the post-Clark Standards. Furthermore, Bean had no opportunity to comply with the standard that attached a presumption of timeliness to the filing of a petition within 90 days after the reply brief because that standard was not adopted until more than 90 days after his reply brief was filed.

Bean alleged in his state pleadings that the state petition was filed promptly after obtaining a factual and legal basis for the claims in compliance with In re Stankewitz, supra, 40 Cal.3d at 396 n.1, 220 Cal.Rptr. at 384, and the pre-Clark Standards, and provided several reasonable explanations for the failure to file the petition earlier. Significantly, petitioner does not dispute before this Court or in the court below that Bean filed the state petition within a reasonable time after discovering the factual and legal basis of his claims, but instead argues that Bean failed to explain the reasons for the delay in filing. Again, petitioner acknowledged in an erratum to its mandamus petition, but not here, that Bean did offer such an explanation. Calderon, supra.

The California Supreme Court's order denying Bean's petition as untimely does not clarify what period of time it considered in determining that there was substantial delay. The district court adopted the magistrate judge's findings that although Bean filed the state petition after Clark, the time petitioner should have raised the claims in order to escape the asserted bar was in the pre-Clark period. Findings and Recommendations, at 8, 11, attached to Petition as Appendix C. Petitioner agreed that, for purposes of analyzing the procedural bar, this is a pre-Clark case. See Calderon, supra, 96 F.3d at 1130 & n.4.

Since the procedural bar was not firmly established or consistently applied prior to Clark, it is not adequate to bar federal review, and the district court's ruling in this case was not clearly erroneous. Thus, the Court of Appeals appropriately denied the petition for writ of mandamus..

4. Federalism and Comity Do Not Permit Arbitrary and Haphazardly Applied State Rules of Procedure to Bar Federal Habeas Corpus Review

Petitioner seeks to create what it terms the "pre-emption formulation" of procedural default doctrine. Under its view of the law, all state procedural grounds for decision would be deemed "adequate" in habeas corpus cases without any analysis unless the application of the state rule constituted an independent violation of federal law.

This is a misguided view of the law that seeks to set aside the myriad decisions of this Court upholding the independent and adequate state ground doctrine. See e.g., Ford v. Georgia, 498 U.S. 411 (1991); Dugger v. Adams, 489 U.S. 401 (1989); Harris v. Reed, 489 U.S. 255 (1989); Johnson v. Mississippi, 486 U.S. 578 (1988); Hathorn v. Lovorn, 457 U.S. 255 (1982); County Court of Ulster County

v. Allen, 442 U.S. 140 (1979); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). "State grounds may be found inadequate without descending to a denial of due process." 16 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction § 4025 (1977).

Petitioner's formulation would also conflate the separate requirements of adequacy and independence. "[S]tate procedure can never be independent of the requirements of due process. There would be . . . jurisdiction to review a state decision that refused consideration of any claim, state or federal, on procedural grounds that fell below due process requirements." Id.

The State has identified no reason that the requirement of an "adequate" state ground for decision should be eliminated from habeas corpus cases. The governing principles of comity and federalism are the same in both instances. See Wainwright v. Sykes, 433 U.S. 72 (1977). This Court traditionally has rebuffed attempts to apply the independent and adequate state ground doctrine more deferentially in habeas corpus proceedings than on direct review, see Harris v. Reed, supra, 489 U.S. at 255, for the very sound reason that the doctrine, as applied in habeas corpus proceedings, is non-jurisdictional. Coleman v. Thompson, supra, 501 U.S. at 730-31.

Nothing in the doctrines of comity or federalism permits the barring of federal habeas corpus review by the application of arbitrary, haphazard, or otherwise "inadequate" state court grounds for decision. This Court should reject petitioner's attempt to rewrite the rules of federal procedure to do just that.

CONCLUSION

For the foregoing reasons, respondent Anthony Cornell Bean respectfully requests that this Petition for Writ of Certiorari be denied.

Dated: March 25, 1997

Respectfully submitted,

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